

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MUSOMA**

**AT MUSOMA**

**MISC. LAND APPLICATION NO. 51 OF 2021**

**NGUVU MOJA GARAGE ..... APPLICANT**

**VERSUS**

**KIRANG'ANI ISOBU ..... RESPONDENT**

*(Application from the order of this Court in Land Appeal No. 65 of 2020)*

**RULING**

25<sup>th</sup> October and 26<sup>th</sup> November, 2021

**KISANYA, J.:**

On 2<sup>nd</sup> July, 2021, this Court (Mkasimongwa, J) delivered an order in respect of Land Appeal No. 65 of 2020 filed by the applicant, Nguvu Moja Garage to challenge the decision of the District Land and Housing Tribunal for Mara at Musoma in Application No. 104 of 2020. The order was to the effect of dismissing the appellant's appeal for being time barred.

That decision did not please the applicant and thus, on 13<sup>th</sup> July, 2021, it filed a notice of appeal to the Court of Appeal. By way of a Chamber Summons filed on 29<sup>th</sup> July, 2021, the applicant lodged the present application seeking an order granting it leave to appeal to the Court of Appeal. The application is supported by an affidavit deposed by Godfrey Nyikuba, the applicant's principal officer. The points of law involved for attention of the Court of Appeal were deposed in paragraph 4 of the supporting affidavit.

At the hearing of this application, the applicant was represented by, Mr. Godfrey Nyikuba, its principal officer whereas, Mr. Ostack Mligo, the learned advocate appeared for the respondent. With leave of the Court, Mr. Mligo prayed to argue the point of preliminary objection in the course of submitting against the application.

When invited to submit in support of the application, Mr. Nyakuba was brief. He stated the applicant is aggrieved by the order of this Court and urged me to consider the application and supporting affidavit.

Contesting the application, Mr. Mligo started by addressing the Court on a point of law that, the application was misconceived and improperly filed before this Court. He contended that the order or decision subject to this application was reached by consent of the parties. In that regard, the learned counsel argued that the applicant is barred from appealing against the consent decision. He submitted further that the proper recourse was for the applicant to file an application for review. He fortified his argument by citing the cases of **Arusha Planters and Traders Ltd & 2 Others vs Euroafrican Bank (T) LTD**, Civil Appeal No. 78 of 2001 CAT Dar es salaam and **Radvan Shercali vs Lilian Joseph Ogutu & 2 Others**, Land Case No. 449 of 2016, HC Land Division at Dar es Salaam (both unreported).

With regard to the merit of the application, Mr. Mligo argued that the issues related to exclusion of time spent in obtaining judgment in calculating

the time limitation and when the copy of the judgment was supplied to the applicant were not raised or determined in the impugned order. Therefore, he was of the view that the said issues cannot be raised in the intended appeal.

In the light of the above submission, Mr. Mligo implored me to strike out the application for it being incompetent.

Re-joining, the applicant argued that the crux of the matter is whether or not the time used to obtain the copies of judgment is excluded in calculating the time limitation. Being a lay person, he conceded that he was not sure whether the order subject to this application is not appealable.

I have considered the submissions made by the parties. I find it apt to start with the preliminary objection. Is the application misconceived and improperly before this Court? In view of the submission by the counsel for the respondent, this objection is premised on contention that the impugned order is not appealable for it being a consent decision.

I have gone through the cases of **Arusha Planters and Traders Ltd & 2 Others** (supra) and **Radvan Shercali** (supra) cited in support of the objection. Both decisions are relevant to an appeal against the consent judgment. Reading from the impugned order, it was recorded that the applicant conceded that the appeal was time barred. However, the order shows that the appellant's prayer for leave to appeal out of time was not granted and that the

appeal was dismissed. Therefore, it is my considered view that there is no consent order or decision in the case at hand.

Even if I was to consider that there is a consent decision, the law is settled that such decision can be challenged, among others, by way of an appeal with leave of the High Court. This stance was taken by the Court of Appeal in the case of **Arusha Planters and Traders Ltd & 2 Others vs Euroafrican Bank (T) LTD** (supra) relied upon by Mr. Mligo. It was held as follows:-

*".....in Tanzania there is no specific provision in the Civil Procedure Code allowing a consent judgment to be challenged by way of instituting a separate suit. What is clear in the Civil Procedure Code and the Appellate Jurisdiction Act 1979 is that such judgment **can be challenged by way of a review or appeal with leave of the High Court.**" (Emphasize supplied).*

That being the position, I find no merit in the preliminary objection. It is hereby overruled.

Going to the merit of the application, the issue for determination is whether the applicant has demonstrated point(s) of law or fact for consideration by the Court of Appeal. This issue is based on the settled law that, leave to appeal is granted when the intended appeal raises issues of general principle or novel point of law or whether the grounds demonstrate an arguable ground. It is also trite law that, leave to appeal is not granted if the grounds are frivolous, vexatious, useless or hypothetical. This position was stated in the case

of **British Broadcasting Cooperation vs Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004, CAT at DSM (unreported) where the Court of Appeal held:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse. The discretion must however, be judiciously exercised on the materials before the court. As a matter of principle, leave to appeal will be granted where the grounds of appeal raises issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

That position was also stated in the case of **Simon Kabaka Daniel vs Mwita Marwa Nyang'anyi and 11 others** [1989] TLR 64 in which the Court held as follows:

*"In application for leave to the Court of Appeal the application must demonstrate that there is a point of law involved for the attention of the Court of Appeal..."*

In the case at hand, the grounds were deposed in paragraph 4 of in the supporting affidavit which reads:

*"That the order of the first Appellate Court raises the following issues which need to be guided by Court of Appeal of Tanzania, firstly whether it was legally proper the appellant was not entitled to an automatic exclusion of the period of time requisite for obtaining a copy of the decree and or judgment appealed from, secondly whether it was legally proper for the learned High Court*

*judge to dismiss the appeal before him on the ground that the appeal was filed out of time without leave of the court. Thirdly whether the appellant's appeal to the High Court was not duly lodged and fourthly whether it was proper under the law in computing the said period of forty-five days the time requisite for obtaining a copy of the decree and or judgment appealed from shall not be excluded.*

It is my considered view, the above grounds revolve on two issues to the following effect: *One*, whether this Court erred in holding that the appeal was time barred. *Two*, whether it was proper for this Court to dismiss the appeal for being time barred. The issue of time limitation is a point of law. Therefore, the grounds advanced in this application are arguable. In other words, the said grounds are not frivolous, vexatious or useless or hypothetical.

For the reason stated, there is no gainsaying that the application is meritorious. As a consequence, the leave to appeal to the Court of Appeal is hereby granted under section 47(2) of the Land Disputes Courts Act [Cap. 216, R.E. 2019]. Costs to follow event in the intended appeal.

DATED at MUSOMA this 26<sup>th</sup> day of November, 2021.



  
E.S Kisanya  
JUDGE

COURT: Ruling delivered this 26<sup>th</sup> day of November, 2021 in the absence of the parties. B/C Jovian present.

  
E. S. Kisanya  
JUDGE  
26/01/2021